No. 9451.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

ONG GUEY FOON,

Appellant,

vs.

HARRY B. BLEE, Assistant District Director of Immigration and Naturalization,

Appellee.

BRIEF FOR APPELLANT.

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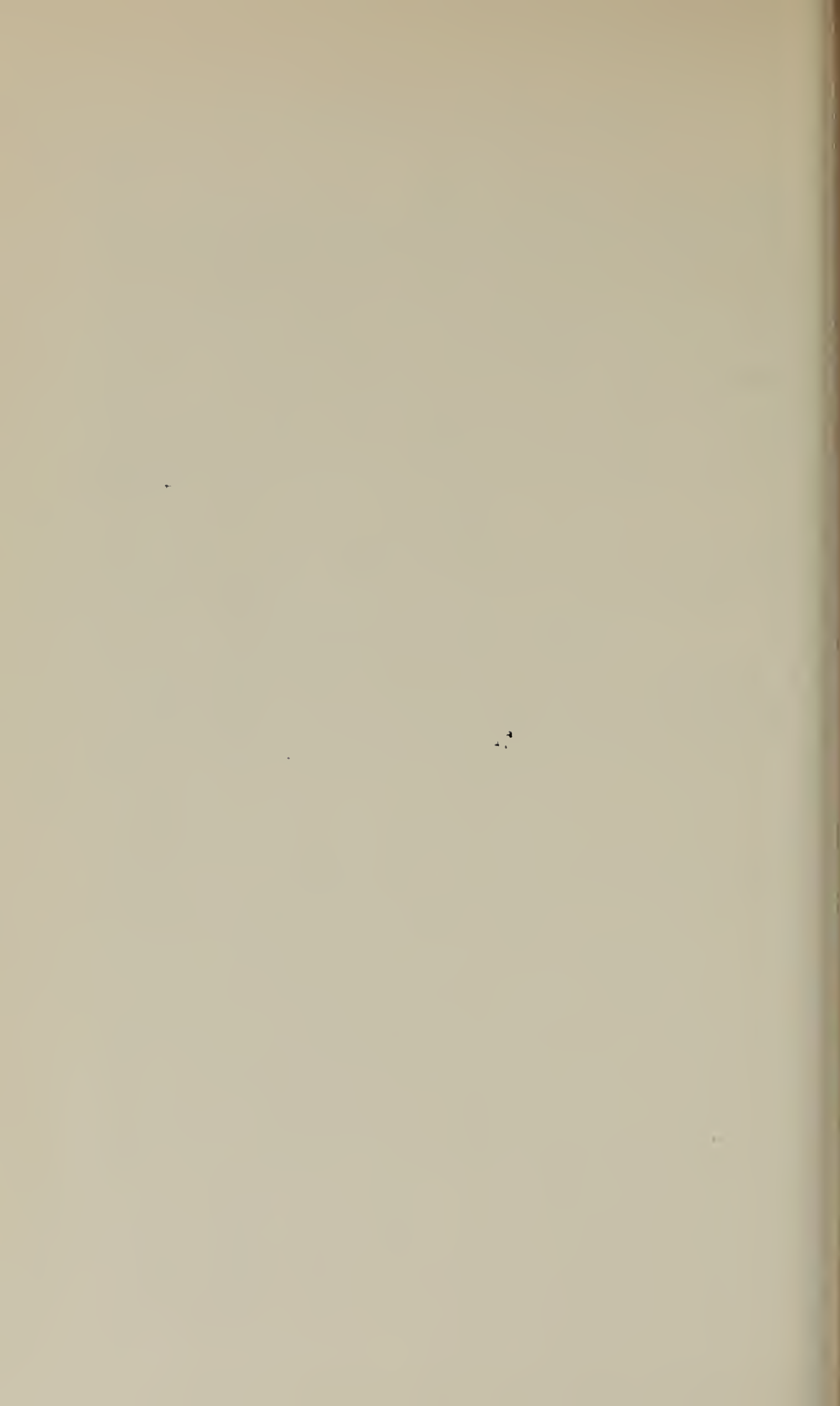

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BRIEF FOR APPELLANT.

The Pleadings.

Under the provisions of Title 28 U. S. C. Sections 453-4, Ong Guey Bet on September 20th, 1939, filed a petition for a writ of habeas corpus with the District Court in and for the Southern District of California, Central Division, in behalf of his brother Ong Guey Foon, the appellant in this proceeding, setting forth therein certain allegations as to the American birth and citizenship of their father Ong You, the relationship of father and son between the said Ong You and the appellant, and the unfairness of the Immigration Authorities in the hearings accorded the appellant [Tr. of R. pp. 1-8]. The writ was issued and made returnable before that court on October 16th, 1939 [Tr. of R. pp. 8-9] on which date, the appellee filed a return to the writ [Tr. of R. pp. 10-11] in the nature of

a general denial. Thereafter, a traverse to the return was made incorporating therein all the allegations contained in the petition [Tr. of R. pp. 11-13] and issue was thus joined.

On January 19th, 1940, the District Court dismissed the writ [Tr. of R. pp. 13-15] and promptly thereafter, notice of appeal [Tr. of R. p. 15], cost bond [Tr. of R. pp. 16-18], and a statement of the points on which the appellant intends to rely for the appeal [Tr. of R. pp. 18-19] were duly made, served and filed. This appeal comes before this Honorable Circuit Court of Appeals under the provisions of Title 28 U. S. C., Section 563, paragraph (a).

Statement of Facts.

The appellant, Ong Guey Foon, came to San Pedro, California, ex SS. "President Coolidge" on November 20, 1938 and sought admission as a citizen on the ground that he was the lawful blood son of one Ong You, a native born citizen. The American birth and citizenship of the said Ong You were conceded by the Immigration Authorities and were matters of official record indicating that Ong You was born in San Francisco in 1875 and made a trip to China, departing from the United States in 1880 and returning in 1897, when he was readmitted by the San Francisco Immigration Officials as a native born citizen. During this period of 17 years of residence in China, he married and begot four sons. Appellant asserted that he was one of these sons. In 1915, Ong Guey Bet, one of the older sons, came over to America and was duly admitted by the Immigration Authorities at San Francisco as a natural born citizen, and later in 1917, another son, Ong

Guey Chuck, came over to America but he was rejected because he failed to prove satisfactorily his relationship to Ong You. Since Ong Guey Bet's admission in 1915 he made a trip back to China, departing in 1921 and returning in 1923 when he was again admitted as a citizen. In all the aforesaid immigration proceedings, the name of the appellant, Ong Guey Foon, was repeatedly mentioned as one of the blood sons of Ong You by the father, brothers and corroborating witnesses. When the appellant arrived at San Pedro last year, Ong Guey Bet, being the appellant's prior landed blood brother appeared before the Board of Special Inquiry as the principal witness due to their father's (Ong You's) death in Stockton in 1922. Mrs. Quan Shee, wife of a local Chinese merchant appeared as a supporting witness.

In addition to the testimony of the appellant and his two witnesses, the following immigration records in which the appellant was consistently mentioned as Ong You's son were obtained by the Board of Special Inquiry to check the appellant's claim, viz: (1) San Francisco Immigration Record No. 9599/90 covering the appellant's father Ong You; (2) San Francisco Immigration Record No. 22403/6-5 covering appellant's brother Ong Guey Bet; (3) San Francisco Immigration Record No. 16048/5-1 covering the appellant's brother Ong Guey Chuck; (4) San Francisco Immigration Record No. 12017/14907 covering the appellant's paternal uncle Ong Lok; (5) San Francisco Immigration Record No. 19938/3-7 covering the appellant's cousin Ong Ngooey Lin; (6) San Francisco Immigration Record No. 37387/8-20 covering the appellant's cousin Ong Ngooey Gim; (7) San Francisco Immigration Record No. 29160/6-1 covering appellant's cousin Ang

Ngooi Sin; (8) San Francisco Immigration Record No. 30348/5-10 covering appellant's cousin Ong Nguey Seak; (9) San Francisco Immigration Record No. 35612/14-21 and San Pedro Immigration Record No. 7402/637 covering the appellant's cousin Ang Nguey Yuey. These records were made exhibits in the proceeding at the court below and are available for review by this Honorable Court.

The appellant and his witnesses were questioned and cross-examined by the Board of Special Inquiry in great detail concerning his family, home, village, the surrounding country, relatives, neighbors and their families, schooling, occupation, domestic correspondence, *et cetera,* making up a transcript of hearing of some 36 closely typed, single-spaced pages of testimony by the Immigration Board. Their statements were then checked with the above-mentioned related immigration records. How comprehensive was this hearing can only be appreciated by reviewing the Board of Special Inquiry minutes, San Pedro No. 14036/1437-A dated January 6, 1938, one of the exhibits herein. At the conclusion of the hearing, the board denied the appellant admission on three alleged grounds, to-wit: (1) the appellant testified that there were 15 dwelling houses and 1 lantern house in his home village in China in 1939 while his prior landed brother's (Ong Guey Bet's) *1915* testimony showed there were only 12 houses; (2) the appellant was unable to give the correct dates and the chronological order of births of all the children of his five married cousins or the grandchildren of his paternal uncle Ong Lok; and (3) the appellant was unable to positively identify *one* of the *1915* photographs of his brother, Ong Guey Bet and the *1917* photograph of Ong Guey Chuck. The chairman of the board also thought adversely of ap-

pellant's claim because the latter had a "marked resemblance" with his brother Ong Guey Chuck who was denied admission in 1917.

The excluding order was thereupon appealed to the Secretary of Labor, and on March 1, 1939, Roger O'Donnell, Esq., of Washington, D. C., filed a brief on behalf of the appellant before the Secretary's Board of Review. The appellate board, however, sent the record back to the trial board on April 28, 1939, to check the chairman's comment on the appellant's "remarkable resemblance" to his previously excluded brother, Ong Guey Chuck. The Board of Special Inquiry theerupon had photographs of the appellant taken, and on May 3, 1939, reopened the hearing by calling one of their fellow-officers, Inspector Raymond M. Tong, who testified that the appellant and his brother Ong Guey Chuck were one and the same person and the question of identity was promptly made an additional ground in the excluding order. All this was done without notice to the appellant's attorney until the case was closed. Counsel upon learning this, insisted that an opportunity be given to seek scientific assistance in the matter of identification. Mr. John L. Harris, a well-known identification expert of this city was then requested to examine the various photographs used by the trial board in connection with its investigation as to the appellant's identity and to copy these photographs and also to enlarge them for the purpose of comparison. Finally, on May 31, 1939, the case was reopened to take the testimony of Harris concerning his research and findings in which he pointed out scientifically

that the appellant and his brother Ong Guey Chuck were entirely different persons. The testimony of Harris, his written findings, and his demonstrating photographic exhibits were made exhibits therein and are available for the inspection of this Honorable Court. The trial board excluded the appellant anyway. The adverse ruling was again appealed to the Secretary of Labor who after a delay of almost four months finally confirmed the excluding decision on September 27, 1939.

An application for a writ of habeas corpus was thereupon made by appellant's brother Ong Guey Bet to the court below on the ground that the appellant was denied a full and fair hearing by the Immigration Authorities praying for the discharge of the appellant from the illegal custody of the appellee. The court below, however, denied the application and this is an appeal from that ruling.

Specifications of Error.

The court below held that the appellant was given a fair trial principally because no opportunity was denied him to present evidence in his behalf, and that notwithstanding the clear and forcible presentation made in his favor and that the Immigration Authorities on the evidence submitted could have come to the opposite conclusion by finding that the appellant was entitled to admission, and that although the court itself likewise on the said evidence might have readily reached the same conclusion, it felt nevertheless bound by the adverse decision of the administrative boards [Tr. of R. pp. 13-15]. This conclusion is, of course, erroneous [see Statement of Points, Tr. of R. pp. 20-21].

ARGUMENT.

I.

The First Hearing Accorded by the Immigration Authorities Was Unfair Because the Alleged Testimonial Discrepancies Did Not Afford Substantial Ground for Rejecting the Affirmative Evidence Adduced in Behalf of the Appellant.

The appellant and his two witnesses were given a most searching examination on matters directly and indirectly connected with the question of relationship of father and son between the deceased Ong You and the appellant. Some 412 questions were asked by the chairman of the Board of Special Inquiry in the first hearing. The answers to these questions were checked for accuracy with no less than 9 different immigration records of his various paternal relatives who had come to the United States from his home village in China. Out of this great maze of questions and cross-questions, the chairman of the trial board was able to develop *only two testimonial discrepancies which were easily explainable,* but he nonchalantly waved all these aside and said: "the supporting evidence is very meager, the alleged brother Ong Guey Bet being the only alleged blood relative to appear on applicant's behalf". Certainly, appellee cannot deny that the previously recorded testimony of the appellant's many paternal relatives does have great probative value in this connection; *Lui Tse Chew v. Nagle,* 15 Fed. (2d) 636, 637; *Yee Chun v. Nagle,* 35 Fed. (2d) 839, 840; and *Chung Pig Tin v. Nagle,* 45 Fed. (2d) 636. The only immediate "blood relative" living in the United States was the appellant's brother Ong Guey Bet because his father Ong You is dead and his other brother Ong Guey Chuck did not gain admission in 1917.

This Honorable Court is no doubt familiar with the customary line of examination accorded by the Immigration Authorities in such cases. The appellant's family, relatives, home, domestic life, neighbors, schooling, occupation, physical characteristics of the home village, surrounding countryside, nearby markets and cities, social and religious events concerning the family, and a multitude of collateral matters which might have the slightest bearing on the issue of relationship were thoroughly gone into. As the minutes of the examination are available in the exhibits hereof (San Pedro Board of Special Inquiry Hearing No. 14036/1437-A), it would be an unnecessary tax on the time and energy of this Honorable Court to recite the testimony at this time, but it is suffice to say that there was harmonious agreement between the appellant and his witnesses as well as between his present testimony with those previously given by his father and relatives with probably two exceptions, which will be discussed presently.

The first of the two alleged testimonial discrepancy urged by the chairman of the trial board had reference to the number of houses in the appellant's home village in China. Specifically, the appellant described the said village as consisting of *15* dwelling houses and a lantern house (or school house). He recalled that, about the year 1917, his paternal uncle, Ong Lok, built a house there, and that at about the same time a new lantern house was also built, since which time he could recall of no further change in the village. His brother Ong Guey Bet on the other hand, stated his recollection of the village as it appeared prior to *1915* when he left there and came to this country to join his father. Ong Guey Bet also stated that when he returned to China in 1921, he could only recall the construction of a new

school or lantern house. The 1915 testimony of this witness showed that there were only *12* dwelling houses in the village. Some *24* years have intervened between 1915 and 1939, and this so-called discrepancy clearly reflects only the inevitable changes in any similar villages after nearly a quarter of a century, and, as recognized in the case of *U. S. ex rel. Noon v. Day,* 44 Fed. (2d) 239, is in no wise extraordinary. The court in that case said:

> "* * * The town from which relator comes has a population of about 3000 and within the years that have elapsed since Low Ging was there many changes would naturally take place. The oldest inhabitant of 1896, or indeed of 1917, has probably long since been gathered to his father's patriarches, even as other distinguished persons, hold their pre-eminence but for a short time. Furthermore, persons in China, the same as elsewhere, sometimes change their places of residence. Hence, it is not strange that relator's school teacher no longer lives but four doors distant from the old home of his parents. Again, a fishpond of yesteryear may have been drained, or become dry land with the passage of time. Then, too, men die in China, and sometimes they migrate to the Strait Settlements, and elsewhere, and this may account for some of the discrepancies which here seem to exist. Also, oldtime neighborhoods lose their identities as time goes on, and a later generation knows them not. *To understand all this one has only to recall his own experience with men, time, and events, and such experiences should teach us not to rely too strongly upon the static quality of anything. Indeed, the discrepancies which have been used to bring about the order excluding relator from admission to this country may, I think, be explained by the constantly changing order of life and events as they are everywhere*

> *experienced, and in my opinion the Board of Special Inquiry was at fault in failing to give proper thought to this consideration."* (Italics ours.)

But the chairman of the trial board would have the reader of his "summary" believe that there was no other evidence of record to determine whether or not the appellant's description of the villlage was accurate. THIS IS UNTRUE, as the related records will show. When appellant's cousin Ong Ngooey Sin was an applicant for admission at San Francisco in June, 1920, *no less than 5 paternal relatives* of the appellant testified that there were *15* dwelling houses and a school house in that village; see testimony in San Francisco Immigration Record No. 29160/6-1. His said cousin's testimony at that time showed that there were *15* dwelling houses and one school house, and Sin's father Ong Lok (appellant's paternal uncle) and another son of his, Ong Ngooey Sic (another cousin of appellant) likewise testified at Sacramento on June 14th, 1920. Then Ong Ngooey Kim and Ong Ngooey Yuen, two other cousins of the appellant or brothers of Ong Ngooey Sin also testified at Benson, Arizona, on July 28, 1920, that there were *15-16 buildings* in that village. Again referring to the appellant's cousin Ong Ngooey Lin's San Francisco Immigration Record No. 19938/3-7, and considering the *testimony made in 1910 at San Francisco by Lin and another cousin Ong Ngooey Gim and appellant's uncle Ong Lok with their 1920 testimony, one will actually receive a out and out demonstration that the village had grown, in the interim, from a 12 house to a 15 house settlement.* Like testimony respecting the number of houses in that village in the year 1919 was given by appellant's cousins, Ong Ngooey Yuey, Ong Ngooey Seak and Ong Guey Gim and

appellant's uncle Ong Lok (see board minutes in San Francisco Immigration Records Nos. 35612/14-21 and 30348/5-10). Therefore, it requires very little persuasion to see that an excluding order on such a "ground" urged by the trial board's chairman is ARBITRARY and UNFAIR.

As to the second alleged discrepancy, the closing sentence of the paragraph of the "summary" in question shows that it was *no discrepancy at all* because the chairman readily admitted that the appellant had corrected what appeared to have been a *mere misunderstanding due to the almost similarity in the pronunciation of the last names of his two cousins, Ong Ngooey Lim and Ong Ngooey Gim,* but he was nevertheless unwilling to go back into the record and to correct the misunderstanding as to which, of the families of these two cousins, was which. The appellant was required to answer questions after questions in the most minute detail with reference to the 7 children of his uncle Ong Lok as well as the uncle himself, and 5 of these children of his uncle were married adults, and they in turn have about 20 children altogether, most of whom were born and have lived in the village for the past 19 years. The appellant was in business and employed in the Woo Lung Market during all of this time, making trips every now and then back to his home to see his own family. He frankly admitted that he could not recall the time and chronological order of birth of most of these children. However, when it is conclusively shown and it was freely admitted by the chairman that there was a misunderstanding, *ordinary fairness and ordinary efficiency should have required the trial officer to correct any further error or misunderstanding* dependent upon the principal one. That he did not do so is but an indication that the Board

of Special Inquiry was only vigilant in developing discrepancies to support its excluding order and slept upon the appellant's rights—the right of any citizen to a full, fair and complete hearing of his case. In the case of *Lum Hoy Kee v. Johnson,* 281 Fed. 872, the court said:

> "As I have before observed, in cases tried in such a summary manner and under such conditions so difficult for the applicant for admission as cases of this sort, *a heavy burden is put on the immigration tribunals to protect the rights of the applicant as well as those of the government*". (Italics ours.)

In addition to these 2 discrepancies, the chairman of the trial board urged as a third "ground" for the excluding decision on the appellant's failure to identify certain photographs in the immigration records. One of them was the photograph of his brother Ong Guey Bet taken in *1921* and attached to the original Form 430 certificate issued that year. The chairman, however, did not report in his "summary" that when this Form 430 certificate was issued to Ong Guey Bet in 1921, some careless officer casually stamped directly across the face of it the stereotyped information regarding the date, steamer, etc., when he departed from this country. Suppose that the appellant had misidentified this partially mutilated and defaced photograph, why did not the chairman or the other members of the trial board show the appellant the other photographs of Ong Guey Bet contained in his 1915 record? Why use a photograph at all? Ong Guey Bet was before the board in person, so why was not the appellant permitted to identify him, if he could, in person? The other photograph that the appellant failed to identify was a picture of his brother Ong Guey Chuck who was denied admission

at San Francisco in *1917.* This is a typical "passport picture" of the like of which this Honorable Court in a similar situation in *Louie Poy Hok v. Nagle,* 48 Fed. (2d) 753, said: "Failure to recognize the photograph is not to be considered as proof that the claimed relationship does not exist". *The evidence of record shows that the appellant has not seen this brother for nearly 16 years.* It should be noted that the chairman commented that there is a "marked resemblance" between the appellant and this photograph, and *in a subsequent hearing held that the appellant and this Ong Guey Chuck constituted one and the same person,* the absurdity of which claim is immediately apparent. The chairman did not give the appellant an opportunity to identify the photographs of his father Ong You and *misstated* in his "summary" that "The Board had *no* photographs of the alleged father" (last sentence of first paragraph on page 40 of board minutes). *There are several photographs of the appellant's father Ong You in San Francisco Immigration Record No. 22403/6-5 covering appellant's brother Ong Guey Bet and in San Francisco Immigration Record No. 16048/5-1 covering his brother Ong Guey Chuck.* Furthermore, the chairman for some unknown reason, did not report the remaining portion of the evidence on record respecting the appellant's ability to recognize the photographs of his other relatives! When shown the photograph of his cousin Ong Ngooey Gim which has been reposing in the immigration records since 1927, the photograph of his cousin Ong Ngooey Yuey which has been reposing in the immigration records since 1934, and the photograph of his cousin Ong Ngooey Sik which has been kept in the immigration records since 1929, the appellant correctly identified each and every one of them. There were still many other photographs of his relatives avail-

able for identification in the immigration files but the *chairman,* at this point, apparently seemd to have deemed it wise to show the appellant no more photographs of his paternal relatives, and *failed to even mention, much less reported, the appellant's accurate identification of those shown him.* Our Supreme Court held in *Kwock Jan Fat v. White,* 253 U. S. 454, 40 S. Ct. 566, that

> "It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a *full record is preserved of the essentials* on which the executive officers proceed to judgment". (Italics ours.)

In *Gambroulis v. Nash,* 12 Fed. (2d) 49, 52, it was held that "The Courts will not review the findings of the Department of Labor on the fact question involved, *if there is substantial evidence to support it",* and therefore, "Whether there is any substantial evidence presented at the hearing to support the charge is a *question of law, reviewable by the Court".* (See also *Whitfield v. Hanges,* 222 Fed. 754, 138 C. C. A. 199; *U. S. ex rel. Berman v. Curran,* 13 Fed. (2d) 96; and *Ex parte Chung Thet Poy,* 13 Fed. (2d) 262.) This Honorable Court held in *Nagle v. Dong Ming,* 26 Fed. (2d) 438, that "it must be borne in mind that mere discrepancy does not necessarily discredit testimony". Our Supreme Court requires that there must be sustantial evidence to base an order of exclusion; *Ng Fung Ho v. White,* 259 U. S. 276, 42 S. Ct. 494; *Tang Tun v. Edsell,* 223 U. S. 673, 32 S. Ct. 359; and *United States v. Ju Toy,* 198 U. S. 253, 25 S. Ct. 644, and admonishes that *although Congress has given great powers*

to the immigration officials over Chinese immigrants as well as citizens of Chinese descent, this power should be exercised, not arbitrarily but fairly and openly, under the restraint of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin, creed or race; Kwock Jan Fat v. White, 253 U. S. 454, 40 S. Ct. 566.

It is, of course, easier for the immigration officers to dispose of cases by short cuts without clear legal grounds or evidence but it was held in the case of *Mason ex rel. Lee Wing You v. Tillinghast,* 27 Fed. (2d) 580, 581, as follows:

> "We assume that these tribunals are not bound by the rules of evidence applicable to a jury trial. But *they are bound by the rules of reason and logic—by what is commonly referred to as common sense.* Compare Commonwealth v. Jeffrie, 7 Allen (Mass.) 548, 563, 83 Am. Dec. 712; State v. Lapage, 57 N. H. 288, 24 Am. Rep. 69; 1 Wigmore Evidence, Secs. 12, 13, 34.
>
> "* * * but this cannot be said of every discrepancy that may arise. We do not observe the same things, or recall them in the same way, and an American citizen cannot be excluded, or denied the right of entry, because of immaterial and unimportant discrepancies in testimony covering a multitude of subjects.
>
> "* * * *When Congress vested in these administrative tribunals the power of determining family relationship and citizenship, it freed them from the technical methods of proof that the courts have, but not from the obligation of seeking the truth with open and reasoning minds*". (Italics ours.)

II.

The Second Hearing Accorded by the Immigration Authorities Was Unfair Because the Excluding Order Rendered Against the Appellant Was Based on Conjectures Instead of Substantial Evidence.

Apparently not satisfied that the aforesaid "grounds" were sufficient to sustain an order for the appellant's exclusion, the appellate board ordered an investigation of the trial board chairman's comment on the question of identity between the appellant and his previously excluded brother Ong Guey Chuck. On May 3, 1939, Immigration Officer Raymond M. Tong appeared before the Board of Special Inquiry and testified that after looking over the *1917 photograph of Ong Guey Chuck* and comparing it with a photograph of the appellant taken by the immigration inspectors at San Pedro and the appellant in person, he came to the conclusion that they were one and the same person. The 1917 photograph of Ong Guey Chuck was a front facial view of a *16 or 17 year old boy* while the appellant's photograph was that of a *middle-aged man* of 43 years old. The gist of Inspector Tong's opinion was his answer to question No. 428 as follows:

> "I would say after examining Ex. 'D' (1939 photograph of appellant) and the photograph contained in San Francisco file 16048/5-1 (1917 photograph of Ong Guey Chuck), that they represented the same person. In viewing the photograph contained in the San Francisco file thru the magnifying glass, it can be seen that the formation of the ears are identical with that on Ex. 'D'; the formation of the nose is similar; the large lips, position of the eyes are in my opinion identical and it is noted that there is a scar on both Ex. 'D' and the photo-

graph contained in the San Francisco file, at the outer corner, left side of the mouth in exactly the same position. Ex. 'D' is undoubtedly a photograph of the person before the Board. *There appears to be a scar below the outer corner of the right eye on the cheekbone on the photograph in San Francisco file 16048/5-1, which is not obvious on the person now before the Board* although there appears to be several small indentations in the same position as the scar shown on the photographs in San Francisco file". (Italics ours.)

On the above testimony, the trial board decided that the appellant was not himself, but was in fact, his brother Ong Guey Chuck, and again excluded him, overlooking entirely the one and only issue in the case, to-wit: whether or not the appellant was the blood son of his American born father Ong You. Inspector Tong's testimony may be liken to the following illustration used by Professor John H. Wigmore in his treatise on "Generic Human Traits" (page 333, The Principles of Judicial Proof, 2nd Edition). An eminent Queen's counsel spoke about the quickness with which a certain witness arrived at a conclusion, of a case that occurred some years ago in England. A woman who had cohabited with a tradesman in a country village suddenly disappeared. Her paramour gave out that she had gone to America. Some years after a skeleton was found in the garden of the house where she had lived. On examination by a medical man he at once pronounced it to be that of the missing woman. He formed this opinion from the circumstances that one of the teeth was gone, and that he had extracted the corresponding one from the woman some years before. Upon this the prosecution was instituted, and the man was com-

mitted for trial to the assizes. Fortunately, there was time before the trial came on for a further investigation of the garden where the skeleton was found, and on digging near the spot another skeleton was discovered, and then another, and another; then several more. This threw some doubt upon the identification of the bones in question, and on further inquiries being made it turned out that the garden had once been a gypsy burial ground. It need scarcely be added that the prosecution, which had been vigorously taken up by the government, was at once vigorously abandoned.

On the insistence of the appellant's counsel, John L. Harris, an identification expert and examiner of questioned documents was finally granted the privileges of copying the 1917 photograph of Ong Guey Chuck and of making prints from the negative for Exhibit "D" (1939 photograph of appellant taken by Inspector Howard Day). In order to make a systematic comparison of these two photographs, Harris made an enlargement of the 1917 photograph of Ong Guey Chuck maintaining the comparable features of the subject thereof approximately the same size with those of the appellant's 1939 photograph or the so-called Exhibit "D", and then superimposed one photograph over the other (Exhibits "F-1" and "F-2"). The superimposed photograph of Ong Guey Chuck, was then cut in such a manner so as to allow the lifting of portions thereof for direct and immediate comparison with the corresponding features of the appellant underneath. The value of this scientific method of direct comparison can readily be appreciated by any fair minded person because the comparable features of one photograph are of virtually precise and identical in size as the

same features in the other, so that if the two persons are identical, each feature of the face should check against the other without noticeable difference. Harris also compared the appellant's person and facial features with those revealed in the 1917 photograph of Ong Nguey Chuck. On May 31, 1939, Harris made the following findings:

> "You are advised the following information together with results of my examination of certain photographs for the purpose of determining whether one Ong Guey Foon is the same or a different individual than Ong Guey Chuck.
>
> "My qualifications for examining and comparing photographs is based upon over twenty years' experience in identification work. I maintain a laboratory with complete photographic equipment devoted to identification work involving questioned documents and other unusual problems of an identification nature with reference to photography. As an identification expert, I have upon many occasions examined exhibits for different departments of the Government and testified in the Federal Courts.
>
> "*The photograph of Ong Guey Chuck is not a suitable one for identification purposes. Much of the detail in the face is concealed by shadows. It is conceded in police identification practice that two photographs are required; one profile view and a front view of the face. The photograph of Ong Guey Chuck does not allow for an examination of the ears or the profile of the face.* On the photograph of Ong Guey Foon there appears many facial scars. These are on the chin, above the upper lip, one to the right of the mouth on the cheek, and one to the left of the mouth on the cheek, and a large scar on the bridge of the nose.

"On the photograph of Ong Guey Chuck there is one small scar to the left and slightly above the corner of the mouth and probably another scar on the right cheek slightly higher and further from the corner of the mouth than the scar on the left cheek. It is possible, although I am not certain, that a scar exists on the upper left center of the lip. *I do not identify any scars on the photograph of Ong Guey Chuck on the forehead near the hairline or on the bridge of nose.*

"It is my opinion that while the photographs of Ong Guey Foon and Ong Guey Chuck may *show some similar general facial features,* these may be *due to family or nationality characteristics. Aside from the general characteristics there are not sufficient individual peculiarities observable in these photographs to assume that Ong Guey Foon and Ong Guey Chuck are the same person.*

"The scar on the left cheek in the photograph of Ong Guey Chuck is not of the same form or in the same position as any scar on the cheek of Ong Guey Foon. The many other scars which can be identified in the photograph of Ong Guey Foon do not appear in the photograph of Ong Guey Chuck. These scars would be the identifying characteristics but they are not identified as corresponding in both photographs.

"I have also taken into consideration that *there is a lapse of 22 years in time between the photographs of Ong Guey Chuck and Ong Guey Foon. As a whole, the evidence is vague, uncertain, and unreliable, and in my opinion, it is not reasonable to assume upon such evidence that these two photographs represent the same persons."* (Italics ours.)

These exhibits and findings were submitted to the trial board and his testimony before it was substantially the same.

Whether or not the trial board had considered these composite photographs is not known as far as the record reveals but it can be readily seen that it limited itself to very general statements, noting *only* things which appeared to them to be similar but *no note whatever was made of any apparent differences.* The trial officers *ignored the startling difference in the appearance of the lower portion of the appellant's face as compared with that of his brother Ong Guey Chuck. The appellant's chin is obviously twice as long as, and of an entirely different formation than, the corresponding features of Chuck.* It resembles more the very long and heavy chin of his father Ong You whereas Chuck's does not. But the strange thing is that, if one turns to the opinions of the board members and Immigration Officer Tong, one would assume that neither of the two subjects of the photographs had a chin or lower jaw, for not a single one of them has taken into account this great difference, so strongly depicted in Exhibit F-2. Coming now to the matter of identification marks, it is perfectly clear that the real question here is this: *If the photograph of Chuck clearly shows identifying marks, which are not apparent on the face of the appellant, it must be equally clear that they are not, and could not be, the same person.* Immigration Officer Tong in his testimony before the trial board referred to a "circular scar" to the left of Chuck's mouth and what he seemed to consider as similar scar on the appellant. But the most that the chairman could do was to say that, although the scar on the appellant "appears to be closer to the nose" he

nevertheless opined that the scars indicated on both photographs "appear to be *relatively* in the same position." Whatever he meant by *"relatively"*, the fact is that the scars are NOT in the same position, as *that of the appellant is almost on the lip, while that of Chuck is nearer the cheek.* Harris testified that *this scar was in the nature of a "small oblong depression" to the left of Chuck's mouth which could not be found on the photograph or person of the appellant.* Inspector Tong stated that there is a "scar below the outer corner of the right eye on the cheek bone" in Chuck's photograph but qualified his statement saying that this *"is not obvious"* on the person of the appellant. What he apparently meant to say, and what is in fact, is that this scar *does not exist* on the person of the appellant. Indeed, *when the Immigration boards* (trial and appellate) *held that Chuck "has no marks or scars that are not present on the applicant"* (*appellant*), *the statement was not true.* Some of the most tragic miscarriages of justice have been due to testimonial errors in identification. The process of identification certainly calls for caution and precaution. It calls for caution, in that testimonial assertions to identify must be accepted only after the most careful consideration. The risk of injustice being so serious and the great possibilities of lurking error should cause hesitation, and the investigator should seek to establish as many marks as possible that may check the testimonial assertions. The process also calls for precaution, in taking measures beforehand objectly to reduce the chances of testimonial error.

In any event the value of *using photographs alone* as a means of identification is unreliable; *Ruloff v. People,* 45 N. Y. 213. Under the Bertillon system, both the *front* and *profile* views are necessary, and even then, the French

police authorities regard their importance, in so far as they show facial expression, as only secondary. The Bertillon system is based upon four chief measurements: (1) head length, (2) head breadth, (3) middle-finger length, and (4) foot length. These measurements are believed to remain constant during *adult* life. Each of these dimensions is subdivided into three classes, small, medium and large, and the resulting eighty-one classes are filed away as primary headings for reference. Each of these primary headings is again subdivided, according to other measurements, such as the height, the span, the cubit, the height of the bust, and the length and breadth of the ear. The nose is described according to its profile. The bridge may be concave, rectilinear, or convex. The direction of the alae nasi, with reference to the pendicular of the profile, may be ascending, horizontal, or descending. The classification of the ears is determined bv the character of the outer border, the profile of the antitragus, the contour of the lobe, and the adherence of the lobe to the cheek. The color of the eyes is made the basis of seven classes. The presence of peculiar marks upon the body is also detailed, and the measurements of the head, nose, and ears are *supplemented by front and profile photographs.* There are many limitations to the Bertillon system, and one of the principal difficulties is the *system is applicable only to the adult, in which age alone the measurements are known to be constant.* That is why it had to give way in modern police practice to the fingerprint system or dactyloscopy, the proving of identity by the digital patterns because there is no more difference between the digital designs of a child who is just born, and those of the same subject at two years, five years, ten years, or twenty years,

than there is between successive enlargements of the same photographic negative, and because the physiological wear of the skin does not change in the least detail the design, which is not modified pathologically. It is therefore readily appreciated that the rather primitive and haphazard manner by which the appellant was "identified" by the Immigration expert to be the same person as his brother Ong Guey Chuck was *unscientific, arbitrary and unfair. Nothing could be more outrageous on our sense of justice than to try to establish identity by comparing a 16 year old boy's photograph with that of a 43 year old adult.*

As to the general resemblance between the appellant and Ong Guey Chuck, counsel invites another comparison, in order that the resemblance between these two brothers may not seem to be an anomoly. Compare the photograph of Ong Guey Bet on his receipt for certificate of identity dated July 16, 1915 in San Francisco Immigration Record No. 22403/6-5, with the photograph of Ong Guey Chuck of record. Such comparison indicates a strong resemblance between them, at least as good as between Chuck and the appellant. Neither Bet nor Chuck have the elongated and pronounced chin of the appellant, and their noses are more nearly identical in appearance. All three seem to resemble one another, and to bear recognizable family characteristics. This is distinctly favorable to the appellant's cause, and consistent with the claim of relationship which the appellee cannot deny. The law does not prevent Ong Guey Chuck to seek admission again one year after his exclusion in 1917. If he really cares to come over again and believes that he is in a better position to prove his right to such admissibility, he does not need to pass himself off as his brother, who in the final analysis

must likewise prove his case before he could be admitted. There was neither sense nor necessity and therefore no motive for him to assume any other role than that of his own. In any event, the one principal task that must be performed which applies to him as well as to all of his brothers is to show satisfactorily their relationship to Ong You, the American born citizen. This was adequately proved with substantial and satisfactory evidence by the appellant before the board of special inquiry at San Pedro. Ong You, during his lifetime, did consistently and repeatedly claim the appellant as his son. The affirmative evidence adduced in the hearing before the trial board conclusively proved that the appellant is a lawful and blood son of Ong You whose American nativity and citizenship were conceded by the Immigration Authorities. *The attempt of the immigration boards to thus construct a case of fraud against the appellant was certainly arbitrary as well as childish. The mere formality of giving a hearing by the immigration officers can be of no avail to the appellant if the testimony of competent witnesses and material evidence are to be entirely disregarded and the findings are to be made only in accordance with the Immigration Department's fixed policy to exclude under any kind of pretense and excuse.* The boards clearly disclosed nothing but a hostile determination to exclude, so when one's right as a citizen was examined by officers in that spirit, the hearing given him could have been anything but fair. All these warn us of the danger of tolerating a system where the officers assume the role of prosecutor, judge, jury and witness all at once, and the ordinary rules for the protection of the appellant's rights are held in abeyance.

III.

The Court Below Erred in Holding That the Hearings Accorded by the Immigration Authorities to the Appellant Were Fair Because No Opportunity Was Denied Him to Present Evidence in His Behalf and Therefore It Was Bound by the Decision Rendered.

The court below ruled erroneously when it held that the appellant "very plainly has had a fair trial in that no opportunity has been denied him to present evidence in his behalf" [Tr. of R. p. 13]. The Immigration Authorities must not only give an applicant for admission an opportunity to present evidence in his own behalf *but must also accord due and careful consideration to such evidence presented, otherwise the hearing would be nothing more than an empty gesture.* This Honorable Court held in the case of *Gung Yow v. Nagle,* 34 Fed. (2d) 848, 851, *et seq.,* as follows:

> *"The mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses,* either of a fixed policy to give weight to a presumption of law far beyond legislative intent or because of a policy calculated to entrap witnesses into statements inconsistent with his own or other witnesses' statements, and then to base an order of exclusion or deportation upon such variances or discrepancies as are reasonably to be expected in all human testimony either due to lack of memory, to temporary forgetfulness, to lack of observation, or to inattention to questions, or to a failure to fully appreciate their force or significance." (Italics ours.)

The requirement in such a hearing is that there should be an honest effort to arrive at the truth by methods sufficiently fair and reasonable to amount to due process of law; *Chin Yow v. United States,* 208 U. S. 8, 28 Sup. Ct. 201, L. Ed. 369. Here the immigration boards certainly did not abide by any such methods. *The officers knew nothing of the actual facts at issue but simply matched witness against witness so as to develop discrepancies and arbitrarily ignored all other affirmative evidence contained in the relating records which pointed to the truthfulness of the appellant's testimony.* This very Honorable Court held in the *Gung Yow v. Nagle* case, 34 Fed. (2d) 848, 853, that such a method used in arriving at an adverse decision is unreasonable.

It is well settled that our Courts will not interfere with the findings of the immigration authorities upon a question of fact unless the findings were arbitrarily reached or the decision is unfair or is not supported by evidence; *United States v. Ju Toy,* 198 U. S. 253, 25 Sup. Ct. 644, 49 L. Ed. 1040; and *Tang Sun v. Edsell,* 233 U. S. 673, 681, 682, 32 Sup. Ct. 359, 56 L. Ed. 606. It is equally settled that the decision of the immigration authorities must be after a *hearing in good faith,* however summary, *Chin Yow v. United States,* 208 U. S. 8, 28 Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, *Zakonaite v. Wolf,* 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218, *Kwock Jan Fat v. White,* 253 U. S. 454, 458, 40 Sup. Ct. 566, 64 L. Ed. 1010. If the record discloses that the immigration authorities have exceeded their power, the applicant may demand his release on habeas corpus. *Geigow v. Uhl,* 239 U. S. 3, 9, 36 Sup. Ct. 661, 59 L. Ed. 1493. If discrepancies form the basis of an excluding decision, the same must be sufficient to satisfy

reasonable minds that the decision is justified, *United States ex rel Leong Ding v. Brough,* 22 Fed. (2d) 926; *Go Lun v. Nagle,* 22 Fed. (2d) 246; *Johnson v. Ng Ling Fong,* 17 Fed. (2d) 11; *Johnson v. Damon ex rel Leung Fook Yung,* 16 Fed. (2d) 65; *Ex parte Chung Thet Poy,* 13 Fed. (2d) 262, and subsequently affirmed in 16 Fed. (2d) 1018; and *Nagle v. Wong Ngook Hong et al.,* 27 Fed. (2d) 650.

It is within the province of the Court to ascertain whether or not there is any substantial evidence to support an order of exclusion; thus, in *Dan Foo v. Weedin,* 8 Fed. (2d) 221, this Honorable Court said:

> "How far the excluding decision may have been controlled by this latter consideration we do not know, but, in any event, *we find no substantial evidence in the record tending to controvert or disprove the facts set forth in the certificate.*" (Italics ours.)

In *Gambroulis v. Nash,* 12 Fed. (2d) 49, 50, our 8th Circuit Court of Appeals said:

> "As we view this case, it is reduced to one question, viz: *Was the decision of the Department of Labor based upon substantial evidence* presented at the hearing?" (Italics ours.)

In *Svarney v. United States,* 7 Fed. (2d) 515, 518, the Court said:

> "* * * Our further conclusion must therefore be that *there was no substantial evidence in the record to support the findings* in the warrant of deportation." (Italics ours.)

The Court below felt that it was bound by the decision of the immigration officers in spite of "the clear and forcible presentation made in behalf of the petition for the writ, and the possibility that the Court might readily reach an opposite conclusion," citing the cases of *Quon Quon Poy v. Johnson,* 273 U. S. 352, and *Weedin v. Yee Wing Soon,* 48 Fed. (2d) 36, for its authority [Tr. of R. pp. 13-14]. These two cases could not be applied to the instant one. In the *Quon Quon Poy* case, *supra,* the *Court declined to hear witnesses offered by the appellant for the purpose of independently establishing his citizenship* holding that an applicant for admission *who has never resided in the United States is not entitled* under the Constitution *to a judicial hearing of his claim* of his American citizenship. This was not the intention or wish of the present appellant [see petition for writ, Tr. of R. pp. 1-7]. He asked for his release by the writ on the ground that the excluding decision depriving him of his citizenship rights and privileges was not based on substantial evidence and *rested only on the affirmative evidence adduced in his favor before the immigration board of special inquiry.* That it was within the power of the Court below to review such evidence certainly requires no further argument; *Kwock Jan Fat v. White,* 253 U. S. 454, 40 Sup. Ct. 566. As to the *Weedin v. Yee Wing Soon* case, *supra, this Honorable Court did carefully review the evidence of record,* and that it however found that the discrepancies were not due to forgetfulness or mistake but on incidents which occurred less than a year before the appellee and his father were examined by the immigration authorities

and therefore the excluding was based on substantial evidence, was beside the question. It certainly does not hold that the Court is absolutely bound by the decision of the immigration boards regardless of the evidence of the record. This very Honorable Court also held in the case of *Gung Yow v. Nagle,* 34 Fed. (2d) 848, 851, that "the mere hearing of witnesses by an officer is of no avail to a party, if the evidence of competent witnesses is to be entirely disregarded and findings made in the teeth of the testimony of one or a dozen such witnesses."

In the instant case, it was plainly seen that the first hearing accorded the appellant was a mere formality of matching one witness against another for the sole purpose of developing discrepancies to base an order of exclusion without any regard to the multitude of statements previously given by the appellant's relatives which overwhelmingly confirmed the truthfulness of the appellant's testimony. The second hearing revealed that the immigration officers acted all at once as prosecutor, judge, jury and prosecution-witness, and only after the insistence of appellant's counsel, the hearing was reopened to permit the submission of scientific evidence which was ultimately disregarded by them in favor of the prosecution's haphazard conjectures and unscientific conclusions. *This unintended and reluctant concession by the immigration authorities to permit the appellant the formality of presenting evidence on his own behalf cannot by itself cure a hearing that was inherently unfair. It only gave an official color to an obvious and predetermined injustice.* The Court below certainly erred in its conception of what constitutes a fair hearing.

Conclusion.

In summarizing the arguments in behalf of the appellant, it has been clearly shown (1) that affirmative evidence adduced before the immigration boards establishes to a reasonable certainty that the appellant is an American citizen being the lawful and blood son of his father, a native born citizen of the United States, (2) that the two discrepancies developed in the first hearing were obtained by the immigration authorities through matching one witness against another in utter disregard to the actual facts previously perpetuated by the testimony of appellant's relatives in nine different official immigration records which were before the examining and reviewing officers, (3) that in connection with the matter of identification of photographs, the examining officers showed only some and withheld many pictures of record to the appellant, calling attention to only the ones that the appellant failed to recognize and suppressing the mentioning of those that he successfully identified, (4) that the conclusion drawn by the immigration officers in the second hearing to the effect that the appellant was not himself but was really one of his alleged brothers was only predicated upon absurd conjectures through comparing photographs of a 16-year-old boy with a 43-year-old man, (5) that the subsequent reopening of the second hearing at the insistence of the appellant's counsel to permit submission of scientific assistance without giving such evidence its due consideration did not cure the unfairness of the hearing, (6) that the Court below erred in believing that it was bound by a decision so

founded by the immigration authorities and that the said decision was not unfair, and (7) that rules in the cases of *Quon Quon Poy v. Johnson, supra,* and *Weedin v. Yee Wing Soon, supra,* are not applicable to nor are their facts and circumstances similar with those of the appellant's case.

It is therefore respectfully requested that the order of the Court below be *reversed* with direction to issue a writ of habeas corpus releasing the appellant from the illegal custody of the appellee.

Dated at Los Angeles, California, this 15th day of April, 1940.

Respectfully submitted,

YOU CHUNG HONG,
Attorney for Appellant.